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Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1036

IN THE

Supreme Court of the United States

TRIBUNE COMPANY, FOX ENTERTAINMENT GROUP, INC., FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., AND VIACOM INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents do not dispute that the scope of speech permitted for owners of newspapers and broadcast stations is of fundamental public importance, not only to those speakers but also to their listeners, viewers and readers. This point is confirmed in this case by the FCC's own findings that the ownership restrictions left in effect by the Third Circuit's decision inhibit the creation of more and better news and local affairs programming. Pet. App. 305a, 435a, 447a-449a, 459a.

The law surrounding this point could not be less settled or less satisfactory. Since 1969, this Court has repeatedly indicated that it would need to revisit whether rational basis scrutiny applies to regulation of broadcast speech if technological change sufficiently increased the channels of

electronic communication. Pet. 15-16. Congress and the FCC have partially deregulated the media industry on just this basis, including in the order at issue. For two decades, numerous court of appeals judges have urged this Court to provide heightened scrutiny of broadcast regulation in light of technological change or at least to revisit the issue. *Id.* at 16-19. And, this Court's decisions addressing cable television and the Internet confirm the breadth of these changes and set forth equal protection principles that bar the FCC's effort here to restrict the speech of owners of newspapers and broadcast stations but not, for example, owners of cable television systems.

Respondents would have this Court maintain the pre-Internet and pre-cable regime simply because those judges have not directly defied this Court's 1978 decision in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). Not surprisingly, the Government is quite content to continue to regulate broadcast speech free from this Court's usual level of enforcement of the First Amendment. The time has come for this Court at least to consider – in a case shaped for this purpose – whether to end the second-class status of broadcast speech under the First Amendment.

1. Respondents err in claiming that review is unwarranted because the Third Circuit's decision is "interlocutory." See Fed. Opp. 12-13. The Third Circuit reviewed an indisputably "final" order of the FCC, and finality was a prerequisite to that court's jurisdiction. See 28 U.S.C. § 2342(1). The resulting decision conclusively disposed of the constitutional and statutory issues subject to Tribune's and the networks' petition. Pet. App. 43a-47a. Neither respondent suggests that the FCC can or will reconsider or act inconsistently with those Third Circuit determinations if the FCC chooses to take any action on remand (which it is not compelled to do). The Third Circuit's order purporting to retain jurisdiction to review any subsequent FCC order ensures that the court's determinations will remain final. *Id.* at 106a.

Declining review on this basis would be especially misguided and harmful because the Third Circuit's decision subjects petitioners to the speech restrictions contained in the FCC's concededly outmoded broadcast ownership restrictions, including the 1975 cross-ownership rule. See 47 C.F.R. § 73.3335(b). The decision's effect is not "interlocutory," but has been finally implemented through a judicial determination that can be reviewed or revised only by this Court.[1] The Third Circuit stayed the effect of the FCC order, including the deregulatory portion of it that repealed the 1975 rule and relaxed the local television ownership rules. Pet. App. 21a, 106a. Had the court vacated or stayed only the portion of the FCC *Order* that it invalidated (formulating new and less extensive ownership restrictions), petitioners' speech rights would have been considerably less restricted.

Prometheus's claim (Opp. 2) that review is barred whenever an agency's order is remanded is clearly wrong: that rule would eviscerate this Court's oversight of lower courts' review of administrative orders. The Government's parallel claim (Opp. 12-13) ignores how the Government routinely seeks, often successfully, review of judicial decisions that remand proceedings to an agency.[2] Neither respondent cites any precedent indicating that remand renders a court's review

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[1] This current, ongoing harm to the speech interests of petitioners and their viewers and readers makes nonsense of Prometheus's suggestion (Opp. 16-17) that license applications now pending *before the FCC* will provide a better vehicle for review. These disputes might evolve in any number of ways during the years of litigation required before they might be ripe for this Court's review. And broad, multi-party rulemaking proceedings, such as that reviewed here by the Third Circuit, provide far superior records compared to those produced in adjudicatory application proceedings.

[2] *See, e.g., Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752 (2004); *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597 (1986); *Costle* v. *Pac. Legal Found.*, 445 U.S. 198 (1980); *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508 (1979).

of final agency orders "interlocutory," and ample precedent supports this Court's review in circumstances akin to this case even for proceedings not involving agency orders. See R. Stern et al., *Supreme Court Practice* § 4.18, at 259-60 (8th ed. 2002) (collecting cases); *id.* (review especially warranted where case involves issue of public importance or current harm to fundamental rights). Indeed, this Court very recently granted the Government's petition to review the Third Circuit's "preliminary" First Amendment determination made in the course of remanding a challenge to the Solomon Amendment for further district court proceedings. See *Rumsfeld* v. *Forum for Academic Institutional Rights, Inc.*, No. 04-1152 (U.S. cert. granted May 2, 2005)

2. Respondents argue that the relevant law is settled because no lower court has directly flouted *NCCB*. Fed. Opp. 15-16; Prom. Opp. 9-10. This argument is doubly wrong. This Court has often acknowledged that *NCCB*'s underpinnings may need to be reviewed as they are eroded by technological change and developments in the legal regime regulating different media outlets. See Pet. 14-16. And, while lower courts have acknowledged that they are bound by *NCCB*, judges on different courts of appeal have indicated (in conflict with the Third Circuit) that those pre-conditions expressly identified by this Court have clearly been met and that greater First Amendment protections should apply. See *id.* at 13-14, 17. Respondents would instead require that lower courts register their conflict through defiance of this Court's decisions, creating just the perverse incentive that members of this Court have recently criticized. See *Roper* v. *Simmons*, 125 S. Ct. 1183, 1209-10 (2005) (O'Connor, J., dissenting); *id.* at 1229-30 (Scalia, J., dissenting).

Acknowledging the deep and long-standing conflict on this issue, the Government claims (Opp. 16 & n.8 & 18-19) that the many opinions calling for heightened First Amendment scrutiny of broadcast regulation are directed to content regulations, and especially *Red Lion Broadcasting Co.* v.

FCC, 395 U.S. 367 (1969), rather than to ownership regulations. This claim misreads those critiques. They instead reflect a fundamental theoretical and factual attack on the claim that "spectrum scarcity" justifies rational basis review of broadcast speech. See Pet. 13-14, 17 (reviewing cases). As Prometheus acknowledges (Opp. 4), "spectrum scarcity" provided the basis for this Court's initial rejection of heightened First Amendment scrutiny in the broadcast context in *NBC* v. *United States*, 319 U.S. 190, 226 (1943), which addressed ownership limitations, and *Red Lion* (and *NCCB*) simply applied *NBC* v. *United States* directly to other contexts. See *NCCB*, 436 U.S. at 795-96, 799-800; *Red Lion*, 395 U.S. at 394-95. Attacks directed to *Red Lion*'s reliance on "spectrum scarcity" to establish the appropriate First Amendment standard apply equally here.

This error also infects respondents' attempt to argue that the FCC and Congress have not sent the "signal" that "technological developments have advanced so far" that a heightened level of First Amendment scrutiny of broadcast speech is appropriate. *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). The Government claims (Opp. 19-21) that the FCC did not provide this signal when it concluded that technological change had removed any basis for retaining the Fairness Doctrine (see Pet. 16-18), because the FCC did not also desist from other forms of broadcast regulation, and that Congress did not do so through various deregulatory ownership initiatives reflecting technological change (see *id.* at 17-18), because Congress did not also "enact[] any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations." Fed. Opp. 21. These claims mistake both this Court's observation in *League of Women Voters* and its role in protecting speech. It is not for Congress to set the appropriate level of this Court's scrutiny, and the "signal" this Court then awaited was an indication that "technological change" had occurred that justified "some revision of the system of

broadcast regulation." 468 U.S. at 376 n.11. Respondents do not dispute that Congress and the FCC have repeatedly signaled that myriad new channels for electronically communicated speech have developed, and both Congress and the FCC have extensively "'revis[ed] ... broadcast regulation'" on that basis.[3] See Pet. 16-17. The FCC's *Order* itself canvasses those developments at length and predicates the deregulatory facets of its order upon them.[4] See, *e.g.*, Pet. App. 242a-276a. Respondents also mistake this Court's role in upholding the First Amendment by suggesting that this Court must await not only the FCC's or Congress's factual conclusion that technology has developed, but also their legal conclusion that they must relinquish their role as managers of broadcast speech. Respondents would have the fox guard the henhouse until the fox loses its taste for chicken.

Similarly, the Government (Opp. 17-18) and Prometheus (Opp. 8-9) err in arguing that the broadcast spectrum remains scarce because there is less of it than speakers would like to use. As Judge Bork observed 19 years ago, scarcity in this sense is no different from the scarcity of newsprint, billboards, or other goods used for communication, and cannot justify lesser protection of such speech. See *Telecomms. Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986). The issue is not whether "spectrum

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[3] A very recent FCC staff research paper provides an exceptionally clear signal that technological developments have rendered "spectrum scarcity" obsolete and unjustified as a basis for lessened First Amendment protections. *See* FCC, Media Bureau Staff Research Paper 2005-2, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Mar. 2005) (John Berresford), *available at* http://www.fcc.gov/mb/mbpapers.html.

[4] This aspect of the FCC's *Order*, and the very ample record evidence supporting it and even cited in the *Order*, entirely rebut Prometheus's claim (Opp. at 9) that limited record evidence addressed "spectrum scarcity." *See, e.g.*, Pet. App. 242a-276a, 289a-305a, 310a-320a, 487a-509a.

scarcity" exists, but whether it today justifies providing only rational basis review for restrictions on broadcast speech. And the answer must be "no" in light of the multitude of other electronic channels of speech that have developed since *NCCB* was decided.

3. Respondents cannot reconcile the Third Circuit's decision with *NCCB*'s equal protection analysis, which upheld the cross-ownership rule only because the rule at that time (i) equally regulated all "owners of the major media of mass communications" and (ii) did not "limit the circulation of information." 436 U.S. at 801-02. The media industry and the understanding of its practices have changed dramatically since 1978, and neither *NCCB* requirement is met today. For the latter requirement, the FCC *Order* itself concluded that common ownership of newspapers and broadcast stations "lead[s] to the production of more and qualitatively better news programming and the presentation of diverse viewpoints" and that "the [1975 cross-ownership] rule actually works to inhibit such programming." Pet. App. 449a, 435a. Respondents have no rejoinder to this point.

As to *NCCB*'s other requirement, the Government claims (Opp. 23) that cable television systems (which the rule does not restrict) are not "major media" for purposes of *NCCB*'s test because they present limited local news and information.[5] This distinction is (i) factually baseless, as any viewer of the many local, regional, public, educational, and government cable television channels will attest,[6] (ii) an amendment of the

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[5] The Government's newly-minted argument (Opp. 24) that ownership of Internet services and sites is too diffuse to permit meaningful application of the rule to their owners must surprise customers and competitors of Microsoft, Google, Yahoo!, AOL, or cable television companies that provide Internet access.

[6] *See Eleventh Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 35 Comm. Reg. (P&F) 93 app. C at tbl.C-4 (F.C.C. 2005); 47 U.S.C. § 531.

NCCB test that finds no support in the decision itself, and (iii) an impermissible *content-based* distinction.[7]

Nor are respondents right in claiming that the Third Circuit's application of rational basis review to reject petitioners' equal protection claims is consistent with *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), and other decisions of this Court. Prometheus (Opp. 13) and the Government (Opp. 22) rely only on *Turner*'s discussion of when *strict* scrutiny is inapplicable and rightly note that the special characteristics of a communications medium may render strict scrutiny inappropriate. They ignore the core holding in the case: "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." 512 U.S. at 640-41 (citation omitted). It is not enough, as the Government would have it, to accept the FCC's assertion that the ownership restrictions have benign effects and intent; as *Turner* indicated, *id.* at 642-43, heightened scrutiny is this Court's tool to second-guess regulations that restrict a particular class of speech or speakers, which are inherently suspect for that very reason. See also *id.* at 678-80 (O'Connor, J., concurring in part and dissenting in part). Such scrutiny is required here because the FCC restricted particular speakers based on its conclusion that their speech is especially influential because it is laden with local content and widely consumed. See, *e.g.*, Pet. App. 297a-320a, 435a-459a, 481a-501a; *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 235-36 (1997) (O'Connor, J., dissenting).

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[7] Prometheus argues (Opp. 15) that this Court should ignore objections to the content-based nature of the cross-ownership rule because the Third Circuit did not specifically address that point, but this is wrong because the Third Circuit clearly resolved the issue: the argument was squarely presented to the Third Circuit as part of the First Amendment and Equal Protection claims that the Third Circuit decision expressly addressed and rejected. Pet. App. 44a-47a.

4. Respondents also fail to reconcile the conflict between the Third Circuit and D.C. Circuit concerning Section 202(h), Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). The D.C. Circuit interprets that provision as creating a presumption in favor of deregulation "likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')," *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1044 (D.C. Cir.), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), and nothing in *CellCo Partnership* v. *FCC*, 357 F.3d 88 (D.C. Cir. 2004), relied upon by respondents (Fed. Opp. 26; Prom. Opp. 18) and addressing a separate statutory provision, alters that approach. The Third Circuit ostensibly held that Section 202(h) requires only a "business as usual" approach (which would be conflict enough), Pet. App. 32a-33a, but in fact that court applied Section 202(h) to create a headwind against deregulation that would have pushed Farragut's fleet back to shore.

The Third Circuit's stay that leaves in place the broad, 1975 cross-ownership rule and other ownership restrictions – pending that court's review of any subsequent FCC order – further flouts Section 202(h)'s command and creates a circuit split with the Seventh and D.C. Circuits regarding the prerequisites for crafting such remedies. The Government (Opp. 26 n.12) addresses this point only by claiming that courts have "authority" to grant equitable remedies, but respondents simply ignore the contrary conclusions reached by then-Judge Scalia and Judge Easterbrook, writing for their respective courts of appeals and addressing the limits on that authority in the circumstances presented by this case. See Pet. 26; *Reynolds Metals Co.* v. *FERC*, 777 F.2d 760, 764 (D.C. Cir. 1985); *Ill. Bell Tel. Co.* v. *WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

* * * *

Petitioners' First and Fifth Amendment rights have been severely abridged for years, if not decades. The cynical suggestion that this state of affairs should linger indefinitely

on the theory that the case is in an interlocutory posture should be rejected. This case presents a perfect vehicle for resolving the fundamental constitutional question presented, and the Court should use this opportunity to fulfill the promise of prior cases, including *League of Women Voters*, to revisit prior conclusions regarding broadcast speech as legal and technological changes render them obsolete.

CONCLUSION

This Court should grant the petition for certiorari.

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